

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>ABRAHAM DIN</b>	)	
Claimant	)	
	)	
V.	)	
	)	
<b>NATIONAL BEEF PACKING CO.</b>	)	CS-00-0230-748
Respondent	)	AP-00-0447-555
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the November 5, 2019, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. C. Albert Herdoiza of Kansas City, Kansas, and Pablo H. Mose of Dodge City, Kansas, appeared for claimant. Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant recklessly violated respondent's safety policy and was thereafter terminated for cause. Thus, the ALJ denied claimant's requests for medical treatment and payment of temporary total disability benefits (TTD).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 8, 2018, evidentiary deposition of claimant and the exhibits; the transcript of the November 8, 2018, evidentiary deposition of Dakota Roubidoux; the transcript of the December 14, 2018, evidentiary deposition of Kolt Mong and the exhibits; the transcript of the December 14, 2018, evidentiary deposition of Joe Davis and the exhibits; the April 4, 2019, deposition of Selena Sena and the exhibits; the transcript of the April 4, 2019, deposition of Arturo Arteaga and the exhibits; the transcript of the April 5, 2019, deposition of Rudy Gonzales and the exhibits; and the transcript of the April 5, 2019, deposition of Karl Ulibarri and the exhibits, together with the pleadings contained in the administrative file.

### ISSUES

Claimant argues the ALJ failed to apply the burden of proof required under K.S.A. 44-501 to deny benefits on the basis of reckless conduct. Claimant contends his violation of respondent's safety rule did not rise to the level of recklessness required by the statute.

Respondent argues claimant recklessly failed to follow its safety policies, resulting in his injury. Respondent maintains the ALJ's Order should be affirmed, especially because claimant would not be entitled to any benefits given his termination for cause.

The issues for the Board's review are:

1. Did claimant commit a reckless violation of respondent's safety policy pursuant to K.S.A. 44-501(a)(1)?
2. Is claimant entitled to medical treatment and payment of TTD?

### FINDINGS OF FACT

Claimant worked for respondent for nearly 14 years as a maintenance mechanic. Claimant testified he is familiar with standard safety requirements, as well as respondent's safety policies. Claimant underwent safety training, including lockout/tagout procedure training, with respondent. Claimant indicated he never suffered any work accident prior to July 2, 2018.

On July 1, 2018, claimant was assigned by Arturo Arteaga, his supervisor, to perform preventative maintenance in preparation for the following morning. Rudy Gonzales and Kolt Mong worked with claimant during this shift, but they were assigned to replace an insert on a water pump in the basement. Claimant explained he performed his job duties while waiting on his coworkers to complete their assignment, as they were to help each other with the remaining work after the insert was replaced. Claimant indicated he eventually went to check on his coworkers' progress because nearly six hours had passed, and he started falling behind in his work. Claimant stated he was familiar with the pump and it should not take so long to replace the insert.

Claimant explained certain procedures must be followed before working on the pump. First, the breaker in a switch room located upstairs must be turned to disconnect power from the pump. Next, the disconnect located near the pump must be turned off. Claimant stated he assumed the upstairs breaker was locked out as "that would have been the first thing that was supposed to have been done in the beginning."<sup>1</sup>

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<sup>1</sup> Claimant Depo. at 45.

Claimant arrived in the basement room to see his coworkers working on the pump. While he approached his coworkers, claimant looked at the disconnect near the pump and noted it was off, but not locked out. Claimant stated Mr. Gonzales was adjusting some bolts with a pipe wrench and Mr. Mong was hammering a pulley when he arrived. Claimant further described seeing the guard off the pump's belt. Claimant explained the disconnect must be off and locked out before removing the guard from the belt, per respondent's safety regulations.

Claimant testified Mr. Gonzales told him the belt kept falling off and would not adjust, though he did have it lined up. Claimant asked Mr. Mong what he was doing with the pulley since it had nothing to do with the belt. Claimant testified he believed maybe the belt was loose or needed replaced. Claimant continued, "And when I was talking to them, they was just – that is when I went to go reach and – to check the tension on the belt, and that sucker kicked on."<sup>2</sup> Claimant sustained an injury after the pump turned on and severed two fingers from his left hand.

Mr. Mong explained the belt must be perfectly aligned or the pump will not work because the pulleys guiding the belt have no edges. Mr. Mong stated he and Mr. Gonzales were repeatedly turning the machine on and off to test the belt alignment. Mr. Mong testified they did not lock out the disconnect each time they turned off the machine. Mr. Mong stated:

See, but, according to safety, uh, you are not required to turn off a piece of equipment unless you are going to touch a moving part or something near a moving part.

Well, we were just adjusting the bolts on the outside. So we are not touching a moving part or anything near a moving part. So we would just turn it off, adjust the bolts, turn it on.

...

[I]f we were even going to touch that belt or those pulleys or anything of that nature, we would lock it out, because at that point we are touching a dangerous part of the machine; and if it kicks on, we will be hurt.<sup>3</sup>

Mr. Mong remembered the disconnect was off (down) when claimant entered the room prior to the accident. Mr. Mong testified:

Q. [Claimant] says that when he walked into the room, he saw the disconnect down. You're testifying that you recall it being down when he walked in?

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<sup>2</sup> Claimant Depo. at 53.

<sup>3</sup> Mong Depo. at 26-27.

A. Yes, because we had just gotten done testing it.

Q. If it's down and [claimant] puts his fingers on the band as he did –

A. It wouldn't kick on.

Q. If he believes that it's down when he puts his hand on the band, that's not reckless to do?

A. In his mind, he wouldn't have thought it would have kicked on, no.<sup>4</sup>

Mr. Gonzales disputed this testimony, stating the disconnect was on (up) when claimant entered the room. Mr. Gonzales agreed the disconnect was not locked out; he and Mr. Mong removed their locks in order to test the alignment. Mr. Mong testified that, after the accident, he noticed the disconnect was on, so he turned it off and locked it out. Mr. Mong repeated his remembrance that the disconnect was off at the time claimant first walked into the basement.

Joe Davis has been respondent's safety manager for 8 years. Mr. Davis trains employees in respondent's safety policies and investigates accidents. Mr. Davis stated any employee who is going to touch any moving part of a machine must previously lock it out. Mr. Davis testified each employee is responsible for personal safety: each employee has a lock and must use it regardless of whether another employee has already locked a machine. Mr. Davis noted each employee is trained in the lockout/tagout procedure, and each employee undergoes annual safety re-certification training. Mr. Davis explained failure to lockout a piece of equipment is a level one violation of safety procedures, resulting in termination. Mr. Davis testified claimant was terminated due to this violation.

Mr. Arteaga agreed with Mr. Davis' testimony, stating each employee must lockout equipment if the employee will touch moving parts. Mr. Arteaga also explained that equipment is generally only locked out in the upstairs switch room if electrical maintenance is performed. Otherwise, mechanical maintenance is locked out by the disconnect located near the machine.

Karl Ulibarri, respondent's HR director, also participated in the investigation concerning claimant's accident. After a review of the incident, Mr. Ulibarri and other department heads determined claimant's employment would be terminated as of July 6, 2018. Mr. Ulibarri testified claimant was terminated for failure to lockout/tagout equipment. Mr. Ulibarri testified claimant's restrictions would have been accommodated had he not been terminated.

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<sup>4</sup> *Id.* at 36-37.

Selena Sena has been respondent's workers compensation coordinator for approximately 20 years. Ms. Sena did not participate in the investigation involving claimant's accident, but she did speak with claimant regarding his medical care. Ms. Sena stated respondent provided medical treatment to claimant until his release on March 11, 2019. Ms. Sena testified respondent would have accommodated claimant's temporary restrictions had he not been terminated.

#### **PRINCIPLES OF LAW**

K.S.A. 2018 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2018 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2018 Supp. 44-534a(a)(2) states, in part:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2018 Supp. 44-501(a)(1) states, in part:

Compensation for an injury shall be disallowed if such injury to the employee results from:

- (A) The employee's deliberate intention to cause such injury;
- (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
- (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
- (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

K.S.A. 2018 Supp. 44-510c(b)(2)(C) states:

If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>6</sup>

### ANALYSIS

#### **1. Reckless violation of workplace safety rule or regulation.**

In order to prevail on appeal, respondent must show claimant's injuries resulted from the reckless violation of one or more of respondent's workplace safety rules or regulations; in this case, failure to lockout/tagout. There is no definition of "reckless" in the Kansas Workers Compensation Act. The definition of "reckless" in a civil claim was discussed at length by the Kansas Supreme Court in *Hoard v. Shawnee Mission Medical Center*, where they cited the Restatement (Second) of Torts § 500 comment a (1963):

**Types of reckless conduct.** Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .

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<sup>5</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>6</sup> K.S.A. 2018 Supp. 44-555c(j).

For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.<sup>7</sup>

After reviewing other definitions of “reckless,” the Court in *Wiehe v. Kukal* concluded:

Thus we see that recklessness requires knowledge. The person who is reckless must have prior knowledge; he must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act.<sup>8</sup>

K.S.A. 2018 Supp. 21-5202(j), which applies to criminal conduct, states:

A person acts “recklessly” or is “reckless,” when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

In workers compensation proceedings, the burden is first on the claimant to show that he or she has a right to benefits. Once the claimant makes this showing, the burden shifts to the employer to show an exception barring compensation applies.<sup>9</sup> Respondent has the burden to prove the defenses contained in K.S.A. 2018 Supp. 44-501(a).<sup>10</sup>

In *Solorzano v. Packers Sanitation Services, Inc.*, another failure to lockout claim, the Board found a claimant's failure to lockout the machine before reaching in to clean a moving belt in a machine was reckless.<sup>11</sup> Ms. Solorzano testified she had been trained

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<sup>7</sup> *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 280-81, 662 P.2d 1214 (1983); citing *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

<sup>8</sup> 225 Kan. at 484.

<sup>9</sup> *Anderson v. PARElec. Contractors, Inc.*, No. 118,999, 2018 WL 6074279 (Kansas Court of Appeals unpublished opinion filed November 21, 2018); citing *Messner v. Continental Plastic Containers*, 48 Kan. App. 2d 731, 751, 298 P.3d 371 (2013).

<sup>10</sup> See *Vera-Ruiz v. Dupree Landscaping and Lawn Services, Inc.*, No. 1,066,283, 2015 WL 4716614 (Kan. WCAB July 29, 2015); see also *Unruh v. Rex Stanley Feed Yard, Inc.*, No. 1,053,222, 2014 WL 4976735 (Kan. WCAB Sept. 29, 2014).

<sup>11</sup> *Solorzano v. Packers Sanitation Services, Inc.*, No. 1,056,986, 2015 WL 3642451 (Kan. WCAB May 19, 2015).

regarding the lockout policy. Respondent placed evidence into the record that supported the Board's finding it was clear that the lockout policy was to be strictly followed.

Based upon *Wiehe*, in order to prevail on its reckless violation defense, respondent must prove claimant had knowledge he was violating the lockout/tagout policy, reason to know of facts which create a high degree of risk of harm to another, and that claimant was indifferent to the harm that could result from violating the policy.<sup>12</sup>

Claimant testified he thought the upstairs breaker was locked out. Mr. Mong confirmed claimant's belief, testifying, when claimant first walked into the basement, he saw the disconnect down and would not have thought the machine would have kicked on. Mr. Ulibarri confirmed claimant told him he thought the machine was locked out. Mr. Gonzalez, the only other eyewitness, had a different recollection regarding whether the disconnect was up or down. Mr. Gonzalez' testimony is insufficient to prove claimant had reason to know of facts which created a high degree of risk of harm or was indifferent to the harm that resulted from his failure to lockout the machine.

Claimant's action was not reckless when he mistakenly believed the safety measure was in place. The undersigned finds claimant's claim for compensation is not barred by K.S.A. 44-501(a)(1)(D). Claimant is entitled to medical compensation pursuant to K.S.A. 2018 Supp. 44-510h.

## 2. Termination for cause/TTD.

Claimant requests review of the ALJ's denial of TTD benefits. The Board has consistently held whether a claimant is entitled to TTD benefits due to a termination for cause is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2).<sup>13</sup> As such, the undersigned will not review the termination for cause issue.

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<sup>12</sup> See 225 Kan. at 484.

<sup>13</sup> See *Barker v. FCG, Inc.*, No. CS-00-0442-436, 2019 WL 5865081 (Kan. WCAB Oct. 15, 2019); *Humphreys v. The American Bottling Co.*, No. 1,081,813, 2018 WL 1176269 (Kan. WCAB Feb. 26, 2018); *Moots v. Siemens Energy, Inc.*, No. 1,080,815, 2018 WL 1176266 (Kan. WCAB Feb. 2, 2018); *Stockton v. Walmart Associates, Inc.*, Nos. 1,074,152 & 1,074,153, 2016 WL 7216922 (Kan. WCAB Nov. 7, 2016); *Chapman v. Pro Dig, LLC*, No. 1,073,510, 2015 WL 6777010 (Kan. WCAB Oct. 30, 2015); *Guy v. Harvey County*, No. 1,070,680, 2015 WL 2169369 (Kan. WCAB Apr. 8, 2015); *Gosnell v. Adventures While Growing Childcare Center, Inc.*, No. 1,069,327, 2014 WL 4402476 (Kan. WCAB Aug. 18, 2014); *Willis v. Clearview City*, No. 1,067,116, 2014 WL 1340598 (Kan. WCAB Mar. 24, 2014); *Chappell v. Sugar Creek Packing Co.*, No. 1,068,774, 2014 WL 3055470 (Kan. WCAB June 5, 2014); *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014); and *Dominguez-Rodriguez v. Amarr Garage Doors*, No. 1,058,613, 2012 WL 1652979 (Kan. WCAB Apr. 24, 2012).

**CONCLUSION**

Claimant did not recklessly violate respondent's safety policy and is entitled to medical treatment. The Board does not have jurisdiction to review the termination for cause issue.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated November 5, 2019, is reversed on the denial of medical treatment. The Board does not have the jurisdiction to review claimant's appeal of the ALJ's denial of TTD benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2020.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant  
Pablo H. Mose, Attorney for Claimant  
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier  
Hon. Pamela J. Fuller, Administrative Law Judge